

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARY CHRISTINE NEAL**

Claimant

VS.

**STATE OF KANSAS**

Respondent

AND

**STATE SELF-INSURANCE FUND**

Insurance Carrier

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Docket No. 1,011,746

**ORDER**

Respondent appeals the November 3, 2003 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Claimant was granted benefits in the form of medical treatment and temporary total disability compensation for an injury occurring on May 13, 2003, and a series through June 10, 2003. The Administrative Law Judge acknowledged that claimant had substantial preexisting conditions, but went on to state in his decision "but it seems clear that her acute problems were stimulated by an incident at work, as a program specialist at the Call Center, that she regards as harassment, by unknown perpetrators."

**ISSUES**

Respondent contends that claimant failed to prove that she suffered accidental injury on May 13, 2003, or that she suffered a series of accidents through June 10, 2003. Respondent further disputes that claimant provided timely notice of accident, as is required by K.S.A. 44-520.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Preliminary Decision of the Administrative Law Judge should be reversed.

Claimant alleges she suffered accidental injury to her left shoulder on May 13, 2003, when she was attempting to reconnect her computer underneath her desk. Claimant testified that her computer hookup came apart and she spent approximately 10 minutes under the desk, reconnecting the wires. She stated that this caused her immediate pain in her left shoulder. She did finish the rest of that day at work, but testified that the additional typing that day made it worse. Claimant acknowledged that the first report to respondent of this accident was on June 9, 2003, when she talked with her supervisor, Cindy Whited, the public services administrator II. Ms. Whited acknowledged that claimant mentioned to her on June 9 that she had suffered a problem and claimant was provided an incident report to fill out and return to Ms. Whited. Claimant never returned the form to Ms. Whited and, at the time of the conversation, claimant did not explain to Ms. Whited how she had injured herself or which part of the body was actually injured.

Claimant had a prescheduled appointment with her family doctor, Matthew Buss, M.D., on May 13, 2003, the alleged date of accident. At that time, claimant presented herself for followup treatment for migraines and left arm pain. Claimant provided a history that her arm had been hurting for several weeks and that it hurt with any kind of motion. Claimant advised Dr. Buss that her left arm hurt worse while turning the steering wheel, pushing or pulling, or lifting or twisting with her arm. The pain was located in her biceps and ran up the left side of her neck and down past her elbow, with the epicenter being in the biceps. Dr. Buss was advised that there was no history of trauma.

The first medical record indicating that claimant had suffered a work-related injury was dated June 10, 2003, when she returned to Dr. Buss. At that time, claimant described an incident on May 13, 2003, when she was underneath her desk, fixing a keyboard. Claimant also advised Daniel J. Stechschulte, Jr., M.D., that she had suffered a left shoulder injury when her computer cable fell off and she had to repeatedly lift the cable up and down throughout the course of the day on May 13, 2003.

Claimant sought no medical care from May 13, 2003, the alleged date of accident, until June 10, 2003. Additionally, during this time, she did not speak with her supervisor or any coworkers about any ongoing problems associated with her left shoulder.

Claimant contends that she suffered not only an injury on May 13, 2003, but also a series of injuries through June 10, 2003. However, her work record during that time raises question regarding the legitimacy of this allegation. After May 13 through June 10 (her last day), claimant worked a total of four full days and three partial days. Claimant had developed a habit of working one day and then taking three days off, either vacation days, sick leave or leave without pay. Ms. Whited explained that claimant could take up to three days in a row off without having to provide a medical release to return to work.

This work pattern existed for some time prior to claimant's alleged date of accident. During the three weeks leading up to claimant's alleged accident, she worked a total of

four days plus one partial day, while being gone from work for various reasons a total of eleven days.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> In reviewing claimant's allegation of injury, the Board does not find claimant's description of the incident to be supported by the evidence. Additionally, the fact that claimant was treated by her family physician the very afternoon of the alleged accident, yet failed to mention anything about the incident for nearly four weeks, defies logic.

Respondent contends that claimant failed to provide notice of accident as is required by K.S.A. 44-520, which requires that notice be given to the employer within ten days of an accident, stating the "time and place and particulars thereof . . . ."

Claimant acknowledges she did not provide notice to respondent within the ten-day limit. K.S.A. 44-520 does state that the ten-day notice shall not bar proceedings for compensation under the Workers Compensation Act if "the claimant shows that a failure to notify under this section was due to just cause . . . ."

Claimant argues that she was unaware that she suffered a problem. However, she described a specific onset of pain on the date of accident. Additionally, her work history from the date of accident through the end of her employment on June 10, 2003, does not support her allegation that her condition worsened through a series of microtraumas. Claimant's attendance at work was, at most, sporadic, with an average of three days off between every day claimant appeared at work. This does not support a finding that claimant suffered a series of microtraumas through June 10, 2003. The Board finds that claimant's condition, if it occurred, appeared to have developed on May 13, 2003. As notice was not provided until June 10, 2003, this is outside the ten-day limit set forth by K.S.A. 44-520. Additionally, the Board finds that the description of the incident by claimant does not support a finding that just cause existed which would justify claimant's failure to provide timely notice of accident.

The Board, therefore, finds that the Preliminary Decision of the Administrative Law Judge of November 3, 2003, should be reversed and claimant should be denied benefits, having failed to prove that she suffered accidental injury arising out of and in the course of her employment and further having failed to prove that she provided timely notice of accident.

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated November 3, 2003, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February 2004.

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BOARD MEMBER

c: Leah Brown Burkhead, Attorney for Claimant  
Marcia L. Yates, Attorney for Respondent  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director